Supreme Court, U.S.
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No. 02-978

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P., *et al.*,
Petitioners,

v.

SIX FLAGS OVER GEORGIA, LLC, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of The State Of Georgia

SUPPLEMENTAL BRIEF FOR SIX FLAGS OVER GEORGIA, LLC, *ET AL.*, IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondents Six Flags Over Georgia, LLC, Six Flags Fund, Ltd. (L.P.), and George DeRoy, as Trustee of Six Flags Claims Trust, state the following:

Respondent Six Flags Fund, Ltd. (L.P.) owns 99% of the membership interests in respondent Six Flags Over Georgia, LLC ("Flags"). No publicly held company directly owns 10% or more of the membership interests in Flags.

Respondent Six Flags Fund, Ltd. (L.P.) ("Fund") is a limited partnership. Its managing general partner is the Salkin Family Trust, created by declaration of trust dated May 15, 1980, Avram Salkin and Dorothy Salkin, co-trustees. The only corporate general partner of Fund is SFG, Inc., a California corporation, which is the non-managing general partner and owns a 0.1% partnership interest in Fund. SFOG Acquisition A, Inc. owns a 17.1% special limited partnership interest in Fund, and SFOG Acquisition B, L.L.C. owns an 8.2% special limited partnership interest in Fund. Upon information and belief, Six Flags, Inc. (formerly known as Premier Parks Inc.) and AOL Time Warner Inc. may directly or indirectly own some or all of SFOG Acquisition A, Inc. and SFOG Acquisition B, L.L.C. AOL Time Warner Inc. and Six Flags, Inc. are publicly held.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES..... iii
INTRODUCTION 1
JURISDICTION 3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....4
REASONS FOR DENYING THE WRIT 4
I. PETITIONERS ABANDONED THEIR FEDERAL CONSTITUTIONAL ARGUMENTS 4
II. THE GEORGIA COURT'S *DE NOVO* REVIEW WAS CONSISTENT WITH *CAMPBELL'S* HOLDING 7
CONCLUSION.....8

TABLE OF AUTHORITIES

Page(s)

BMW of N. Am. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001)..... *passim*

Dixon v. MARTA, 242 Ga. App. 262 (2000).....6

Ford Motor Co. v. Stubblefield, 171 Ga. App. 331, 319 S.E.2d 470 (1984) 7

Lisle v. Willis, 265 Ga. 861, 463 S.E.2d 108 (1995) 6

Sochor v. Florida, 504 U.S. 527 (1992) 5

State Farm Mutual Automobile Insurance Co. v. Campbell, Docket No. 01-1289..... *passim*

STATUTES

28 U.S.C. § 1257(a) 3

O.C.G.A. § 51-12-5.1 7

O.C.G.A. § 51-12-5.1(b) 7

O.C.G.A. § 51-12-12 7

RULES

Court of Appeals Rule 27(c) 2

Court of Appeals Rule 27(c)(2), (3).....5

FRAP 28(a)(9) 2

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Respondents Six Flags Over Georgia, LLC ("Flags"), Six Flags Fund, Ltd. (L.P.) ("Fund"), and George DeRoy, as Trustee of Six Flags Claim Trust, respectfully submit this supplemental brief in opposition to the petition for a writ of certiorari pursuant to Rule 15.8 to address the Court's recent decision in *State Farm Mutual Automobile Ins. Co. v. Campbell*, Docket No. 01-1289 (*"Campbell"*).

INTRODUCTION

The verdict in this case was rendered in 1998. After affirmance by the Georgia appellate courts, Petitioners sought certiorari from this Court and, alternatively, a GVR in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). On October 1, 2001, this Court granted a GVR in light of *Cooper*. Pet. App. 59a.

On remand, the Georgia Court of Appeals asked for re-briefing and re-argument. On March 29, 2002, the whole (ten judge) Court of Appeals unanimously affirmed the award of punitive damages. The Court held that Petitioners had abandoned any alleged federal constitutional challenges under well-established Georgia law and procedural rules. Nevertheless, the Court of Appeals also conducted a thorough *de novo* review under *BMW v. Gore* and, alternatively, properly affirmed the punitive damages award of only 1.3 times the compensatory award in this intentional tort case in which (a) the jury expressly found that the Petitioners acted with specific intent to cause harm (Pet. App. 22a, n.3), and (b) the Court of Appeals held in a *de novo* consideration of the evidence that the Petitioners' deliberate breaches of fiduciary duty were "especially reprehensible." Pet. App. 12a.

In their current petition, even before *Campbell* was decided, Petitioners requested *another* GVR. Now that *Campbell* has been decided, this request for another GVR is demonstrably meritless. The facts, 1.3 to 1 ratio, and procedural posture below are entirely distinct from those at issue in *Campbell.* More importantly, the holdings and findings by the Court of Appeals here are totally consistent with the holdings of *Campbell.* Thus, *Campbell* has no effect on the Georgia court's affirmance of the punitive damage award below.

First, the Georgia Court of Appeals has held in this case that ***all*** federal constitutional challenges were abandoned under the applicable Georgia procedural rule, which is almost identical to its federal counterpart. Compare Georgia Court of Appeals Rule 27(c) to FRAP 28(a)(9). Resp. App. 2a-4a. *Second*, the extraterritoriality arguments that dominate *Campbell* are not remotely at issue here, as Petitioners admitted, first, by not raising the issue below, and

second by direct admission before this Court.[1] *Third*, unlike *Campbell*, the actual damages awarded in this case did not contain any "punitive element," such as a large award for "emotional distress," that was "duplicated in the punitive award." *Campbell*, Slip Op. at 16. *Fourth*, the Georgia Court of Appeals has already conducted a thorough *de novo* review and, alternatively, affirmed the 1.3 to 1 award at issue here "based on the facts and circumstances of the defendant[s'] conduct and the ***harm to the plaintiff***[s]." *Campbell*, Slip Op. at 15 (emphasis added). There is no purpose but delay to be served by a GVR to consider issues that have been waived, are not in the case at all, and have already been correctly considered.

JURISDICTION

As discussed fully in the reasons for denying the writ, this Court lacks jurisdiction under 28 U.S.C. § 1257(a) because the federal questions Petitioners now raise were not presented to or decided by the Court of Appeals in the first instance, and were waived and abandoned under state law, as the Georgia Courts expressly held.

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[1] Petitioners concede that *Campbell* is different from this case because *Campbell* "also presents an 'extraterritoriality' issue," Pet. 25, which is absent from this case. The extraterritoriality issue before the Court in *Campbell* could not possibly exist here because the jury in this case was expressly instructed *not* to consider extraterritorial conduct in setting the amount of punitive damages. Resp. App. 33a. The petitioners here were clearly "punished for the conduct that harmed the plaintiff, not for being an unsavory . . . business." *Campbell*, Slip Op. at 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of federal and Georgia statutes, and of the Georgia Constitution, are reproduced at Resp. App., 1a-12a.

REASONS FOR DENYING THE WRIT

I. PETITIONERS ABANDONED THEIR FEDERAL CONSTITUTIONAL ARGUMENTS

Petitioners request a GVR in light of *State Farm Mutual Automobile Ins. Co. v. Campbell,* Docket No. 01-1289 (*"Campbell")* in which an opinion was issued on April 7, 2003. There is no basis for another GVR in this case.

The Georgia Court of Appeals' holding that the Petitioners did not preserve, but instead waived, all their federal constitutional challenges under Georgia law is dispositive and deprives this Court of jurisdiction to consider this petition. *See* Resp. 13-21.

> [T]his Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground, as it will if the state court's opinion "indicates clearly and expressly" that the state ground is an alternative holding.
>
> * * *
>
> It is difficult to comprehend why the State Supreme Court's statement that "the claim was not preserved for appeal" would not amount to "a plain statement that petitioner's claim was procedurally barred," especially since there is no reason to believe that error of the kind [Petitioner] alleged cannot be waived under Florida law. It is even more difficult

> to comprehend why the fact that the State Supreme Court rested upon this state ground merely in the alternative would somehow save our jurisdiction.
>
> * * *
>
> Finally, [the dissent's] suggestion that the State waived its independent-state-ground defense, forgets that this defense goes to our jurisdiction and therefore cannot be waived.

Sochor v. Florida, 504 U.S. 527, 533 & 534-35 n.* (1992) (citations omitted).

The Georgia Court of Appeals' finding of waiver could not be clearer.

> In their enumerations of error, appellants failed to assert that the award of punitive damages violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Instead, they simply asserted the award was "excessive." In two sentences at the very end of their appellate brief, however, appellants noted that "punitive damages also violates the Due Process Clauses of the Georgia and United States Constitutions," citing *Gore*. Appellants did not argue that the award was "grossly excessive"; rather, it alleged the appellees' injury was "purely economic in nature" and "evinced no indifference to or reckless disregard for the health and safety of others." Pretermitting whether this adequately enumerated an "excessiveness" claim under the federal due process clause, we considered the claim of error abandoned because appellants failed to cite to any relevant facts, give record citations, or present any legal analysis supporting that assertion. Court of Appeals Rule 27(c)(2), (3). An assertion of error followed by a case citation is *not* legal argument. As we have explained, legal analysis "is,

> at a minimum, a discussion of the appropriate law as applied to the relevant facts." *Dixon v. Metropolitan Atlanta Rapid Transit Auth.*, 242 Ga. App. 262, 266(4) (529 SE2d 398) (2000).

Pet. App. 11a-12a.

This finding of waiver is not only compelled by the Petitioners' failures to enumerate as error, argue or even mention the *BMW v. Gore* guideposts they now hope to resurrect, but by Petitioners' affirmatively telling the Georgia Court of Appeals – in the first instance – that it should consider the legality of the punitive damages at issue solely under a state law "abuse of discretion" standard.[2] Instead of seeking a *de novo* review of the *BMW v. Gore* guideposts (or even mentioning them), Petitioners expressly invoked the Georgia **state law standard** applicable to state common-law excessiveness considerations. *See* Pet. App. 6a-8a. Petitioners invoked the applicable **Georgia state law** standard because ***state law excessiveness issues*** were all they competently raised and preserved, as the Georgia Court of Appeals correctly held on remand. Pet. App. 11a-12a.

In their Reply Brief, the Petitioners assert that the two pages of "argument" which preceded their rote recitation of *Gore v. BMW* in their original appeal brief supposedly included federal constitutional arguments. (Reply 2). Those arguments, however, (Pet. App. 68a-70a), inform the Court of absolutely nothing relevant to *BMW v. Gore* and, in

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[2] In their original brief to the Court of Appeals, Petitioners alleged that "[t]he trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive" (Resp. Supp. App. 2a), but, under the heading "standard of Review," Petitioners then told the appellate court: "This Court reviews for *abuse of discretion* rulings. . . for excessive damages, *Lisle v. Willis*, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995)." Resp. Supp. App. 3a (emphasis added). Petitioners did not further discuss the standard of review in their briefs to the Court of Appeals.

particular, to its three guideposts. Specifically, in that portion of their brief, Petitioners invited the Court of Appeals to reverse the punitive award because of (a) the state law ***evidentiary*** requirements of O.C.G.A. § 51-12-5.1 requiring "clear and convincing evidence" of misconduct, (b) the trial court's supposed failure to instruct the jury ***twice*** with respect to O.C.G.A. § 51-12-5.1(b)'s state law requirements and (c) the punitive damage award being supposedly "excessive" under Georgia statutory law, citing O.C.G.A. § 51-12-12 and the state law product liability case of *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984). Pet. App. 68a-70a. To the extent raising these state law matters arguably preserved ***any*** issue, the concerns voiced certainly had nothing to do with the extraterritoriality and proportionality issues addressed by *Campbell*. Indeed, they had nothing to do with federal law at all. In any event, every relevant *BMW v. Gore* federal criteria was subsequently fully considered *de novo* by the Georgia Court of Appeals on remand and decided against the Petitioners. Pet. App. 12a-16a.

The Georgia Court of Appeals' decision that Petitioners waived their federal constitutional claims is a jurisdictional bar to this Court considering such claims.

II. THE GEORGIA COURT'S *DE NOVO* REVIEW WAS CONSISTENT WITH *CAMPBELL'S* HOLDING.

Even though the Petitioners clearly abandoned their federal constitutional challenges, the Georgia Court of Appeals went on to expressly consider them and to do exactly what this Court has outlined in *Leatherman* and *Campbell* should be done in such a *de novo* review.

> ...[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the

general damages recovered. *Campbell*, Slip Op. at 15.

The Georgia Court of Appeals undertook such analysis and held that the punitive award was appropriate. The punitive damage award is well within the "single-digit" ratio *Campbell* held to be presumptively valid. *Id.* Indeed, at 1.3 to 1, the award even fits the *Campbell* opinion's observation that "substantial" awards of compensatory damages might support a lesser ratio. *Id.*[3] Certainly, 1.3 to 1 is not "grossly excessive," which is what the Georgia Court has ***already*** alternatively held here. Pet. App. 9a, 12a-16a.

The propriety of the 1.3 to 1 award here is conclusively established by the Georgia Court of Appeals finding under *BMW v. Gore's* third guidepost that the most analogous Georgia civil penalties for comparable misconduct are Georgia treble damage statutes applicable to intentional business misconduct. Pet. App. 15a and n. 10. [4] *See Campbell*, Slip Op. at 14-15. 1.3 to 1 is obviously at the lowest end of that range.

Under these circumstances, yet another GVR in this five year-old appeal is inappropriate.

CONCLUSION

The petition and the embedded request for a GVR in light of *Campbell*, should be denied.

Respectfully submitted.

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[3] Even then, *Campbell* eschewed any "rigid benchmarks." "We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." Slip Op. at 14-15.

[4] Although the Court cites O.C.G.A. § 10-1-763(b) as providing for "double damages," it actually provides for exemplary damages of up to twice any actual damage award in addition to actual damages, *i.e.* treble damages.

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April 10, 2003.

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RESPONDENTS' SUPPLEMENTAL APPENDIX

APPENDIX A

IN THE COURT OF APPEALS

STATE OF GEORGIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., SIX FLAGS ENTERTAINMENT CORPORATION, SIX FLAGS THEME PARKS INC., and SIX FLAGS OVER GEORGIA, INC.,

Appellants/Defendants,

-against-

SIX FLAGS OVER GEORGIA, LLC, SIX FLAGS FUND, LTD. (L.P.), and GEORGE DEROY, as Trustee of the Six Flags Claims Trust,

Appellees/Plaintiffs.

Appeal No. A00A0120

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[September 20, 1999]

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* * *

[Page 15, Summary of Argument]

Seventh, the court erred by not setting aside the $257,000,000 punitive damages award. The evidence here, involving a purely commercial dispute, fell far short of that required to impose such damages. (See enumeration of error 12.) Moreover, all punitive damages above $250,000 must be remitted because the court failed to instruct the jury on the clear-and-convincing burden of proof on the special finding of specific intent to harm. (See enumeration of error 13.) And lastly, the unprecedented amount awarded is excessive under both statutory and constitutional standards. (See enumeration of error 14.)

* * *

[Page 17, Enumeration of Errors]

12. The trial court erred by failing to grant Defendants judgment on liability for punitive damages.

13. The trial court erred by failing to instruct the jury on the standard of proof for specific intent to harm.

14. The trial court erred by failing to strike or reduce Plaintiffs' punitive damages as excessive.

PART THREE

Standard of Review

This Court reviews de novo rulings on questions of law. Bumgarner v. Green, 177 Ga. App. 156, 158-60, 489 S.E.2d 43, 46-47 (1997). Improper jury charges and comments on witness credibility require a new trial if

harmful. Bennett v. Bagwell & Stewart, Inc., 216 Ga. 290, 297-98, 116 S.E.2d 288, 293 (1960); Speagle v. Nationwide Mut. Fire Ins. Co., 138 Ga. App. 384, 385, 226 S.E.2d 459, 460 (1976). Denial of directed verdict and JNOV motions must be reversed if the evidence does not support the verdict. Tate v. Holloway, 231 Ga. App. 831, 833, 499 S.E.2d 72, 74 (1998). This Court reviews for abuse of discretion rulings to admit or exclude evidence, Andrews v. Wilbanks, 265 Ga. 555, 556, 458 S.E.2d 817, 818 (1995), on discovery sanctions, Harwood v. Great Am. Management & Inv., Inc., 171 Ga. App. 488, 491, 320 S.E.2d 269, 272 (1984), and for excessive damages, Lisle v. Willis, 265 Ga. 861, 864, 463 S.E.2d 108, 110 (1995).
